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No. 87-626

In the Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL N. SHERIDAN AND MARY A. SHERIDAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the exception in the Federal Tort Claims Act barring suits against the United States for "[a]ny claim arising out of assault [or] battery" (28 U.S.C. 2680(h)) bars a claim that the government negligently failed to prevent its employee from committing a battery.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 823 F.2d 820. The opinion of the district court (Pet. App. 20a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1987. The petition for a writ of certiorari was filed on October 16, 1987, and was granted on January 19, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671-2680], the district courts * * * shall have exclusive jurisdic-

tion of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680 provides in part:

The provisions of [28 U.S.C. 2671-2680] and section 1346(b) of this title shall not apply to—

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of [28 U.S.C. 2671-2680] and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

* * * * *

STATEMENT

On February 6, 1982, Robert W. Carr, an enlisted Navy medical aide at Bethesda Naval Medical Center, fired several shots from a rifle into petitioners' automobile, injuring petitioner Mary Sheridan. Petitioners brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, alleging that the Navy had negligently failed to prevent the battery by Carr. Specifically, they alleged that Carr "had displayed instances of psychological instability in the past of such nature that the [Navy] knew or should have known that he posed a threat to the wellbeing and safety of others," but that the Navy "took no steps to quell this threat" (J.A. 4). They further alleged that Carr had kept the rifle in his quarters at the Medical Center in violation of Navy regulations and that the Navy "knew or should have known" this fact (*ibid.*).[1] They requested damages of $125,000 (J.A. 5).

In their memorandum in opposition to the government's motion to dismiss (J.A. 6-13, 14-18), petitioners recounted certain facts from the record of Carr's court-martial proceeding and elaborated on the allegations in their complaint (*id.* at 10-18). According to petitioners, on the night of the shooting Carr drank a large quantity of alcoholic beverages after finishing his shift and became inebriated, and between 8:45 and 9:00 p.m., three corpsmen found him on the floor of an old hospital building with a uniform bag. As the corpsmen attempted to take him to the emergency room, Carr broke free, grabbed his bag, and, reaching into it, revealed a rifle barrel. Petitioners

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[1] Petitioners have clarified that allegation by stating that Carr's roommate, a fellow enlisted man, knew that he had a rifle but failed to report it as required by Navy regulations (Br. 3, 25).

asserted that the three corpsmen then fled and did not report the incident. J.A. 10-11; Br. 4.[2] Very shortly thereafter, at approximately 9:00 p.m. petitioners alleged, Carr began shooting at passing vehicles on the public street in front of the hospital (J.A. 4) and hit a Metro bus as well as petitioners' automobile.

The government moved to dismiss on the ground that petitioners' claim is barred by the intentional tort exception to the FTCA, 28 U.S.C. 2680(h), which provides that the government is not liable for "[a]ny claim arising out of assault [or] battery." Petitioners opposed on the ground that their claim arose out of the government's negligent supervision of Carr. The district court dismissed the claim (Pet. App. 20a-29a). A divided court of appeals affirmed (*id.* at 1a-19a), holding that Section 2680(h) bars all "actions alleging negligence of the supervising employees when the underlying tort is an assault or battery by a government employee" (Pet. App. 5a).

SUMMARY OF ARGUMENT

The sweeping language of Section 2680(h) bars any claim "arising out of" various intentional torts. The plain language of the statute bars petitioners' claim because it arises out of Carr's battery. This Court made clear, in accordance with the language of the statute, that Section 2680(h) bars suit where a tort enumerated in the provision is essential to the plaintiff's claim. *Block* v. *Neal*, 460 U.S.

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[2] In fact, however, Carr's court-martial record shows that the corpsmen promptly notified a security officer. One of the three corpsmen, Nurse Florence Jackson, testified at the court-martial that she immediately notified Timothy Uram, who was on security watch, of the danger. Uram testified that he promptly responded to the warning.

289, 297 (1983). Carr's battery is essential to petitioners' claim since, without it, they would have suffered no injury.

The sweeping language of Section 2680(h) demonstrates that Congress intended to bar all claims where an intentional tort of a government employee caused the injury. As four members of this Court in *United States* v. *Shearer*, 473 U.S. 52 (1985), and the majority of the courts of appeals have concluded, that bar may not be circumvented by allegations that the government negligently supervised the employee who committed the intentional tort. The legislative history leading to the enactment of the FTCA in 1946 shows that Congress, proceeding cautiously, did not intend to waive the sovereign immunity of the United States for intentional torts committed by federal employees. The 1974 amendment to Section 2680(h), which authorized claims based on the intentional torts of law enforcement officers, shows that Congress has understood the provision to mean what it says. A contrary conclusion cannot be justified based on petitioners' contention that Congress meant to distinguish between negligent supervision and respondeat superior claims.

Nor can petitioners bring themselves within any exception to Section 2680(h) pertaining to special duties owed by the government to prevent particular torts. Unlike the cases holding that Section 2680(h) does not bar suit for negligently failing to prevent batteries by dangerous inmates, this case does not involve a mental patient or a prisoner or some other sort of dangerous inmate whom the Navy had assumed a duty to control. The only basis for finding the government liable here arises from the tortfeasor's status as a government employee, and Congress plainly intended not to waive sovereign immunity for torts committed by employees. The Seventh Circuit's

recent decision in *Doe* v. *United States*, No. 87-1436 (Jan. 21, 1988), that the government can be liable for failing to protect infants at a government day-care center, does not support petitioners' position, both because it is incorrect and because the Navy here never assumed any special duty to protect petitioners, and the finding that the government had assumed a special duty to protect the children at the day-care center was crucial to the decision in that case.

ARGUMENT

PETITIONERS' CLAIM IS BARRED BY THE INTENTIONAL TORT EXCEPTION BECAUSE IT ARISES OUT OF A BATTERY

A. The Plain Language of Section 2680(h) Bars Petitioners' Claim

The "sweeping" language of Section 2680(h) (*United States* v. *Shearer*, 473 U.S. 52, 55 (1985) (plurality opinion))[3] plainly bars any claim "arising out of" a battery. As petitioners acknowledge (Br. 11 n.5), the word "arise" has a well-understood, ordinary meaning. It means "to spring up, originate, to come into being or notice" (*Black's Law Dictionary* 99 (5th ed. 1979)) or "to originate from a specified source" (*Webster's Third New International Dictionary* 117 (1976)). Congress's choice of the phrase "arising out of" indicates that it intended to establish a broad bar to claims originating in intentional torts. In *Kosak* v. *United States*, 465 U.S. 848, 854 (1984), which involved

[3] In *Shearer*, the Court unanimously held (473 U.S. at 57) that *Feres* v. *United States*, 340 U.S. 135 (1950), barred the claim that the Army had negligently failed to control a dangerous serviceman who kidnapped and murdered a fellow serviceman. Four of the eight Justices participating in the case also concluded that Section 2680(h) barred Shearer's claim. The four other Justices did not join that portion of the opinion addressing Section 2680(h), but did not separately address the issue (473 U.S. at 59-60).

the exception from the FTCA for "claim[s] arising in respect of * * * the detention of any goods or merchandise by any officer of customs" (28 U.S.C. 2680(c)), the Court equated the phrase "claim arising in respect of" with the phrase "claim arising out of" (465 U.S. at 854) and held that such "encompassing" terminology "sweep[s] within the exception all injuries associated in any way with the 'detention' of goods" (*ibid.*).

Petitioners' claim arose out of Carr's battery because, in the absence of the battery, they would not have been injured. Since injury is a necessary element of a tort claim (W. Prosser & W. Keeton, *The Law of Torts* 164-165 (5th ed. 1984)), in the absence of the battery they would have no claim. Here, as in *Shearer*, "[n]o semantical recasting of events can alter the fact that the battery was the immediate cause of [petitioners' injuries] and, consequently, the basis of [their] claim" (473 U.S. at 55 (plurality opinion)).[4]

This Court's decisions construing the misrepresentation exception—also part of Section 2680(h)—confirm that that provision bars claims when a tort enumerated in that provision is essential to the plaintiff's claim. In *United States* v. *Neustadt*, 366 U.S. 696 (1961), the Court held that Section 2680(h) barred a claim by purchasers of a house that they had paid too much as a result of their reliance on a faulty government appraisal. A subsequent

[4] Petitioners contend (Br. 10-11) that the language of Section 2680(h) is not particularly sweeping, and suggest that if Congress had intended Section 2680(h) to be read broadly it would have barred claims "involving" intentional torts. Petitioners are simply wrong in arguing that "arising out of" is not "sweeping" (*Shearer*, 473 U.S. at 55 (plurality opinion)) or "encompassing" (*Kosak*, 465 U.S. at 854). Moreover, if Congress had barred claims "involving" intentional torts, petitioners would undoubtedly argue that their claim does not involve an intentional tort but only involves negligent supervision.

case, *Block* v. *Neal*, 460 U.S. 289 (1983), involved a claim that the government was responsible for negligently supervising the construction of a house, and the government sought to dismiss the claim on the basis that the communication of the government's inspection report, which incorrectly stated that the house had been constructed properly, was a misrepresentation. The Court distinguished *Neustadt* on the basis that the plaintiffs there "alleged no injury that [they] would have suffered independently of" the misrepresentation since they were injured because they learned of and relied on the faulty appraisal (*id.* at 296). But in *Block* "the Government's misstatements [were] not essential to plaintiff's negligence claim" since she was injured by the negligent construction and would have been injured even if she had not learned of and relied on the faulty inspection report (*id.* at 297). Under *Block*, as the court concluded in *Metz* v. *United States*, 788 F.2d 1528, 1534 (11th Cir. 1986), cert. denied, No. 86-189 (Nov. 3, 1986), "a cause of action which is distinct from one of those excepted under § 2680(h) will nevertheless be deemed to 'arise out of' an excepted cause of action when the underlying governmental conduct which constitutes an excepted cause of action is 'essential' to plaintiff's claim." In this case, Carr's battery is essential to petitioners' claim because, without it, there would have been no injury.

The courts of appeals have, by and large, applied Section 2680(h) in accordance with its sweeping language. Since *Shearer*, five courts of appeals have rejected attempts to circumvent the provision where a battery was an essential element of the plaintiff's claim. *Thigpen* v. *United States*, 800 F.2d 393 (4th Cir. 1986) (minor dependents of retired military personnel were sexually assaulted by a medical corpsman while they were patients in a military hospital); *Miele* v. *United States*, 800 F.2d 50 (2d

Cir. 1986) (AWOL serviceman threw acid into the face of a four-year-old boy); *Hoot* v. *United States*, 790 F.2d 836 (10th Cir. 1986) (physical assault on a civilian woman by a soldier); *Johnson* v. *United States*, 788 F.2d 845 (2d Cir. 1986) (mailman sexually assaulted a young girl), cert. denied, No. 86-114 (Oct. 20, 1986); *Satterfield* v. *United States*, 788 F.2d 395 (6th Cir. 1986) (murder of one soldier by other soldiers); *Garcia* v. *United States*, 776 F.2d 116 (5th Cir. 1985) (sexual assault by an Army recruiter upon a potential recruit).[5] Those decisions are correct. As Section 2680(h) plainly states, Congress has not waived sovereign immunity with respect to claims arising out of batteries committed by government employees.

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[5] Prior to *Shearer*, the majority of the courts of appeals had held that Section 2680(h) barred claims where the injury was caused by a battery committed by a federal employee. *E.g.*, *Naisbitt* v. *United States*, 611 F.2d 1350 (10th Cir.) (multiple murders, rapes, and other batteries by servicemen), cert. denied, 449 U.S. 885 (1980); *Wine* v. *United States*, 705 F.2d 366 (10th Cir. 1983) (kidnapping, sexual assault, and shooting by a serviceman); *Hughes* v. *United States*, 662 F.2d 219 (4th Cir. 1981) (sexual assaults on minors by a postman); *United States* v. *Shively*, 345 F.2d 294 (5th Cir.) (shooting by a serviceman who had been issued a military pistol in violation of regulations), cert. denied, 382 U.S. 883 (1965). Prior to this Court's decision in *Shearer*, the only court of appeals that had allowed suit where the injury was caused by a battery committed by a federal employee was the Third Circuit. Its decision in *Shearer* v. *United States*, 723 F.2d 1102 (1983), which was based on its prior decision in *Gibson* v. *United States*, 457 F.2d 1391 (1972) (Job Corps trainee, a government employee under 29 U.S.C. 1706(a)(3), stabbed instructor), was reversed by this Court under *Feres*. See 2 L. Jayson, *Handling Federal Tort Claims: Administrative and Judicial Remedies* § 260.02 (1987) (collecting cases).

B. Petitioners May Not Circumvent Section 2680(h) by Alleging That They Were Injured as a Result of the Negligent Supervision of the Employee Who Injured Them or That the Government Had a Special Duty to Protect Them

1. In conflict with the decisions of the other courts of appeals, the Ninth Circuit has held that Section 2680(h) may be circumvented by plaintiffs who allege that they were injured by the government's negligent supervision of the employee who committed the intentional tort. *Morrill* v. *United States*, 821 F.2d 1426 (9th Cir. 1987) (per curiam) (go-go dancer raped in serviceman's club); *Kearney* v. *United States*, 815 F.2d 535 (9th Cir. 1987) (woman murdered by a soldier after the Army allowed the murderer to violate his restriction to base); *Bennett* v. *United States*, 803 F.2d 1502 (9th Cir. 1986) (students at an Indian boarding school were sexually molested by a teacher).[6] As summarized in the per curiam opinion in *Morrill*, which followed the rule set forth in *Bennett* and *Kearney*, that court has concluded that "although section 2680(h) shields the government from respondeat superior liability for assault and batteries committed by employees, section 2680(h) does not shield the United States from the consequences of its own supervisory negligence" (821 F.2d at 1427). The Ninth Circuit acknowledged that its decisions conflicted with those of the other circuits (*Kearney*, 815 F.2d at 537-538).

Petitioners primarily contend, following the Ninth Circuit's approach, that "Congress' intent was to waive sovereign immunity for governmental negligence, while maintaining that immunity for intentional tort claims

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[6] The government's petitions for rehearing en banc were denied in *Bennett* and *Kearney* on December 21, 1987, and in *Morrill* on February 5, 1988.

based on *respondeat superior, simpliciter*" (Br. 9). Each of the three bases for government liability that they have asserted—that Carr was psychologically unstable and the Navy should have controlled him, that Carr kept a rifle in his quarters contrary to regulation, and that the three corpsmen who found Carr negligently allowed him to escape—are negligent supervision claims, as petitioners define the term.[7] None of the three claims are respondeat superior claims. Under respondeat superior, an employer is vicariously liable *for* its employee's tort, rather than being liable for negligently failing to prevent it, where the employee was acting within the scope of his employment when the tort was committed.[8] Carr plainly was not acting within the scope of his employment when he fired his rifle at their automobile, so the government would not be liable under respondeat superior.

There is no basis in the language of Section 2680(h) for the distinction petitioners and the Ninth Circuit urge. Rather, as the plurality concluded in *Shearer* in rejecting the claim that Section 2680(h) does not bar negligent supervision claims, "it is inescapable that the phrase 'arising out of assault [or] battery' is broad enough to encompass claims sounding in negligence" (473 U.S. at 56). The plurality went on to state: "[Plaintiff] cannot avoid the reach of § 2680(h) by framing her complaint in terms of negligent failure to prevent the assault and battery. Section 2680(h) does not merely bar claims *for* assault or bat-

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[7] Petitioners state that a negligent supervision claim includes any claim that an intentional tort resulted from government negligence (Br. 7 n.4).

[8] " 'Scope of employment' is not confined to acts which may be thought of as component parts of the assigned work," but extends to reasonably foreseeable conduct that arises out of an employer's business, including intentional torts in some circumstances. 2 F. Harper & F. James, *The Law of Torts* 1381, 1391 (1956).

tery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like [plaintiff's] that sound in negligence but stem from a battery committed by a Government employee. Thus, 'the express words of the statute' bar [the] claim against the Government. *United States* v. *Spelar,* 338 U.S. 217, 219 (1949)." 473 U.S. at 55 (emphasis in original).[9]

Nor does the legislative history support the argument that Section 2680(h) bars respondeat superior claims only. Rather, the "sparse" legislative history shows that Congress passed the FTCA "on the straightforward assurance that the United States would not be financially responsible for the assaults and batteries of its employees" (*Shearer,* 473 U.S. at 55 (plurality opinion)).[10] Indeed, at the time the FTCA was enacted the notion that the government would be exposed to liability for the torts of its employees

[9] This Court similarly found the plain words of the statute controlling in *United States* v. *James,* No. 85-434 (July 2, 1986), and rejected an attempt to read into the statute an exception for negligence claims. *James* involved 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." The court of appeals held that Section 702c did not bar claims by recreational users of reservoirs who were injured when the government negligently failed to warn them before opening gates to release flood waters. This Court reversed, holding that the plain language of the statute barred all liability for damage from flood waters.

[10] The most extensive discussion of the intentional tort exception occurred in a colloquy between Assistant Attorney General Francis Shea and members of the House Judiciary Committee. *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary,* 77th Cong., 2d Sess. 33-34 (1942). (The colloquy is reprinted, almost entirely, at Pet. Br. 13.) Mr. Shea confirmed that, under the intentional tort exception, the United States would not be liable where "some agent of the government gets in a fight with some fellow * * * [a]nd socks him."

was novel and controversial, as Congress's exceptionally long consideration of the Act (more than 15 years) shows. When the Act did pass in 1946, "[u]ppermost in the collective mind of Congress were the ordinary common-law torts. Of these, the example which is reiterated in the course of the repeated proposals for submitting the United States to tort liability is 'negligence in the operation of vehicles.' " *Dalehite* v. *United States,* 346 U.S. 15, 28 (1953) (footnotes omitted). Beyond this core area, Congress's intention was to proceed cautiously. See Note, *The Federal Tort Claims Act,* 56 Yale L.J. 534, 547 & n.84 (1947). Alexander Holtzoff, an authoritative source on the meaning of the FTCA (see *Kosak,* 465 U.S. at 856), explained to Congress that the "theory" of the intentional tort exception "is that, since this bill is a radical innovation, perhaps we had better take it step by step." *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary,* 76th Cong., 3d Sess. 22 (1940). Given that Congress was taking a cautious approach, it is not surprising that it intended to bar all claims arising out of the intentional torts of government employees, which are quite different than claims arising out of automobile accidents caused by employees acting within the scope of their employment.[11]

[11] While Congress did not explain exactly why it enacted Section 2680(h), it does not seem difficult to understand why Congress would have decided not to waive sovereign immunity in cases involving intentional torts. Intentional torts are sometimes found to be superseding causes relieving the negligent tortfeasor of liability (Restatement (Second) of Torts § 448 (1965)), and Congress might reasonably have concluded that in all cases the individual tortfeasor, plainly the more culpable party, ought to be required to defend his actions. Such a rule would likely be most effective in deterring intentional torts since injured persons would almost surely choose to sue the government

Petitioners note (Br. 17-19) that at the time Congress was considering and enacting the FTCA both negligent supervision and respondeat superior were recognized as bases for imposing liability on employers for claims arising out of the intentional torts of their employees. That is correct. 2 F. Harper & F. James, *The Law of Torts* 1390-1392 (1956). Contrary to petitioners, however, the obvious conclusion to draw from that fact is that if Congress, presumably aware of the two theories, intended to distinguish between the government's liability depending on the type of claim alleged, it surely would have so indicated in the language of the statute. That is especially so since almost any respondeat superior claim can be pleaded as a negligent supervision claim, so that the effect of a provision that insulated the government from liability only when respondeat superior was alleged would be somewhat limited. But the sweeping language of Section 2680(h) does not hint at a distinction between negligent supervision and respondeat superior. And, as the plurality in *Shearer* concluded, nothing in the legislative history suggests "that Congress distinguished between 'negligent supervision' claims and *respondeat superior* claims, with only the latter excluded under the Act" (473 U.S. at 55).[12]

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rather than the tortfeasor if suit against the government were not barred, and the cost to the government of seeking indemnity from the tortfeasor would likely be high. See also 28 U.S.C. 2676 (barring suit against government employees following judgment against the United States).

[12] There is no merit to petitioners' suggestion (Br. 13) that Assistant Attorney General Shea's comment that "[a]n injury caused by negligence could be considered under the bill" shows that Congress intended to permit negligent supervision claims. Mr. Shea's comment was made in response to Representative Cravens' concern that the intentional tort exception might bar claims for automobile accidents – the paradigmatic claim that Congress intended to permit – because in some jurisdictions a collision would be considered an assault. Mr. Shea simply assured Representative Cravens that a suit based on a negligent collision would not be barred by the exception. That assurance was accurate: "If a government postal driver unintentionally and negligently runs down a pedestrian, the Government may be held liable under the Act; but if he deliberately runs over the pedestrian, the claim is excluded by Section 2680(h)." 2 L. Jayson, *Handling Federal Tort Claims: Administrative and Judicial Remedies* § 260.02, at 13-50.3 to 13-50.4 (1987).

As the *Shearer* plurality also recognized (473 U.S. at 56), the 1974 amendment to Section 2680(h) confirms that the provision does not distinguish between negligent supervision and respondeat superior claims. The amendment waived sovereign immunity for six specified intentional torts, including "any claim arising * * * out of assault [or] battery" committed by "investigative or law enforcement officers of the United States Government." Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50.[13] "The premise of the legislation was that unamended § 2680(h) 'protect[ed] the Federal Government from liability when its agents commit[ted] intentional torts such as assault and battery.' " *Shearer*, 473 U.S. at 56 (plurality opinion) (quoting S. Rep. 93-588, 93d Cong., 1st Sess. 3 (1973)). There is no indication that Congress believed that the government's liability depended on whether the agents had been properly supervised. To the contrary, the amendment was prompted by " 'several incidents' of 'abusive illegal and unconstitutional "no-knock" raids' by federal narcotics agents [that Congress had reason to believe] were the result of inadequate supervision." *Shearer*, 473 U.S. at 56 n.2 (plurality opinion) (quoting S. Rep. 93-588, *supra*, at 2). Congress's understanding that its prior enactment

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[13] The amendment is not directly relevant here because Carr was not an "investigative or law enforcement officer."

precluded all claims for damages resulting from government employees' intentional torts, whatever the theory of liability, is entitled to great weight. See, *e.g.*, *Bell* v. *New Jersey*, 461 U.S. 773, 784-786 & n.12 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378 & n.61 (1982) ("we must examine Congress' perception of the law that it was shaping or reshaping"). Moreover, petitioners' construction of Section 2680(h) would largely render the 1974 amendment surplusage because it is likely that the government would be liable for negligent supervision in most cases involving an intentional tort committed by a law enforcement officer. It is, at least, difficult to imagine any case arising out of an intentional tort committed by a law enforcement officer that could not be pleaded as a negligent supervision claim.[14]

2. Under *United States* v. *Muniz*, 374 U.S. 150 (1963), and *Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954), the government may be held liable, despite Section 2680(h), for negligent failure to prevent intentional torts by inmates of prisons and mental hospitals.[15] The dissenting judge below, recognizing that controlling Fourth Circuit precedent—*Thigpen* v. *United States*, 800 F.2d 393 (1986), and *Hughes* v. *United States*, 662 F.2d 219 (1981)—clearly barred claims alleging that a government employee was negligently supervised (Pet. App. 8a-11a), contended that those cases should be distinguished here because the government could be found liable if Carr were not a government employee. Petitioners alternatively urge that approach if their broader argument that the government may be liable for negligently supervising its employees is rejected.

[14] Petitioners argue (Br. 15) that "if Congress' 1974 use of the phrase 'arising out of assault [or] battery' effected a waiver of sovereign immunity for *respondeat superior* claims, then its use of the identical language in 1946 must have been similarly limited to *respondeat* claims." In our view, the 1974 amendment waived sovereign immunity for *both* negligent supervision and respondeat superior claims in cases involving batteries by law enforcement officers, and all such claims are barred by Section 2680(h) in cases involving other federal employees.

[15] The Court in *Muniz* mentioned Section 2680(h) only in passing, noting that "the Government is not liable for intentional torts of its employees" (374 U.S. at 163). The government did not argue in *Muniz* that Section 2680(h) barred the prisoner's claim that the government was liable for failing to prevent other prisoners from beating him.

There is no merit to that alternative approach here. Its basis is the contention that "had it been a private citizen who the three corpsmen found wandering drunk and brandishing a rifle, the government's liability would be unquestioned" (Pet. App. 12a; see also Pet. Br. 25). But nothing in *Muniz* or *Panella* supports such a conclusion. The duty breached by the government in those cases is the special duty of a custodian to control dangerous persons. See Restatement (Second) of Torts § 319 (1965).[16] Carr was not a mental patient or a prisoner and the Navy was not his custodian, so the Navy had no special duty to prevent him from committing intentional torts. There is no general duty to protect persons from the intentional torts of others. W. Prosser & W. Keeton, *The Law of Torts* 373-385 (5th ed. 1984). The Restatement explicitly provides that "[t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm" in

[16] Section 319 provides that "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." The reporter's notes make clear that the duty is placed on the custodian of institutions housing individuals such as persons suffering from contagious diseases and homicidal maniacs, not on employers whose employees happen to discover a drunk with a rifle.

the absence of a special relationship with the third person or his victim. Restatement (Second) of Torts § 315 (1965). A special relationship could be said to exist between the Navy and Carr only because it employed him.[17] While it is conceivable that a private employer would have had a duty to prevent Carr, as an employee, from intentionally harming others under the circumstances presented here (*id.* § 317),[18] such a claim would be based on Carr's status as an employee. As we have shown (pages 6-16, *supra*), Congress did not intend to make the government responsible for the intentional torts of its employees.[19]

The dissenting judge below suggested (Pet. App. 14a) that the "literalist interpretation" of Section 2680(h)

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[17] No special relationship exists between the Navy and petitioners either. See page 21, *infra*.

[18] Section 317 provides: "A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control." While petitioners allege a violation of the duty to control Carr under these circumstances, it is by no means clear that they would be able to prove a violation if they were not barred by Section 2680(h) from bringing their claim.

[19] If Carr had been a mental patient at a government hospital, then, under cases following *Panella*, the government would be liable if it failed to exercise reasonable care to control him knowing that he was dangerous, even though he happened to be a federal employee. But the source of the duty to control in such a case would be his status as a mental patient, not his status as a federal employee. That is all that the government noted in our brief in *Shearer* (at 22 n.5); contrary to petitioners (J.A. 12; Br. 22-23), the government did not concede that the United States would properly be held liable in a case such as this.

adopted by the plurality in *Shearer* "is belied by the concession" that Section 2680(h) does not bar claims arising out of intentional torts committed by non-employees, and petitioners make a similar argument (Br. 13-14). It is indeed the case that nothing in the language of Section 2680(h) supports the interpretation, adopted explicitly in *Panella* and implicitly in *Muniz*, that the provision does not bar claims arising out of intentional torts committed by persons such as mental patients and prisoners. But that is not a reason to ignore the language of Section 2680(h) altogether. There is an important difference between the approach of the court in *Panella* and the approach petitioners urge. The court in *Panella* concluded from the FTCA's legislative history that Congress was focusing on torts committed by federal employees and read the phrase "committed by a federal employees" into Section 2680(h) on the theory that that is what Congress actually meant. Petitioners, in contrast, seek to change the meaning of the sweeping words Congress actually used in a way that is not consistent with Congress's intent since, in focusing on torts committed by federal employees, Congress plainly intended to bar all claims arising out of the intentional torts of those employees. Under petitioners' construction of Section 2680(h), "arising out of" is deprived of any meaning.

3. A divided panel of the Seventh Circuit recently held, in a case involving sexual molestation of children at an Air Force day-care center, that "where the government affirmatively assumes a duty to protect a person prior to and independent of any assault, and where an alleged breach of that duty leads to an assault on the person, whether or not by a government employee, the claim arises out of the government's negligence, and 28 U.S.C. § 2680(h) does not bar the cause of action." *Doe* v. *United States*, No. 87-1436 (Jan. 21, 1988), slip. op. 9-10 (petition

for rehearing pending).[20] That decision is based on Restatement (Second) of Torts § 315(b) (1965), which provides that a duty to control third parties arises where "a special relation exists between the actor and the other which gives to the other a right to protection." Petitioners attempt to bring themselves within the rule of Section 315(b) by alleging that "when the government promulgated regulations concerning weapon storage and safety, it voluntarily assumed a duty to protect them from injury" (Br. 21 (footnote omitted)).

As an initial matter, the Seventh Circuit erred in *Doe* v. *United States, supra*. Its decision is based on its conclusion that "the claim arises *solely* due to the government's alleged neglect of the children" (slip op. 7 (emphasis in original)). But that is plainly wrong. An intentional battery, the sexual molestation, is an essential element of the claim, since without the battery there would have been no injury. As we have shown (pages 6-8, *supra*), under this Court's decisions construing Section 2680(h) a claim is barred where a tort enumerated in Section 2680(h) is an essential element of the plaintiff's claim. Moreover, as the dissenting judge in *Doe* v. *United States* stated: "This distinction has no foundation in the statutory language. Section 2680(h) plainly and unambiguously bars claims 'arising out of assault [or] battery.' It does not exempt negligence claims arising from breaches of 'affirmative duties' imposed as a result of 'special relationships.' *See Thigpen*, 800 F.2d at 395-96." Slip op. 13.[21]

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[20] The Second Circuit recently dismissed without prejudice an interlocutory appeal in a case involving allegations of sexual molestation at a military day-care center. *Doe* v. *Scott*, No. 87-6061 (Mar. 24, 1988).

[21] The court in *Thigpen* concluded that Section 2680(h) barred a claim brought by girls who were sexually molested by an employee at a Navy hospital while they were patients there. The court explicitly rejected the position of a concurring judge "that § 2680(h) is inapplicable whenever the government can be found to owe plaintiff 'an affirmative duty,' " explaining that "the statutory derivation of [the concurring judge's] position remains obscure" (800 F.2d at 395).

In any event, the government assumed no special duty to protect petitioners. Unlike children in a government day-care center, they are just members of the general public. The regulation on which petitioners rely in asserting that the Navy voluntarily assumed a special duty to protect them appears to be aimed at protecting other servicemen, not members of the general public, since it does not prohibit servicemen from possessing firearms altogether but only prohibits them from keeping them on the base (Pet. App. 3a). But, whatever the purpose of the regulation, it plainly did not create a special duty on the part of the Navy to protect the general public. Indeed, it is contradictory to state that a special duty was assumed to protect particular persons and then assert that the persons protected include all members of the general public. Accordingly, the court below correctly concluded that petitioners' citation of the regulation adds nothing to their claim. Pet. App. 3a-4a; accord *Satterfield* v. *United States*, 788 F.2d 395, 398 (6th Cir. 1986).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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